STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 15

October 24, 2000

Requested by: **Crusader Insurance Company**

Concerning: **Department of Insurance rules requiring insurers to (1) file all underwriting eligibility guidelines and rules, and (2) reduce all underwriting eligibility guidelines to writing**

Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

ISSUE

Do rules utilized by the Department of Insurance requiring insurers to (1) file all of their underwriting eligibility guidelines and rules, and (2) reduce all underwriting eligibility guidelines to writing, constitute "regulations" as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?[1]

1 . This request for determination was filed by the Crusader Insurance Company (Cary L. Cheldin, President), 23251 Mulholland Drive, Woodland Hills, CA 91364-2732, (818) 591-9800. The Department of Insurance's response was filed by Brian G. Soublet, Chief Counsel (at the time of the agency response) and Elizabeth Mohr, Senior Staff Counsel, 45 Fremont Street, 21st Floor, San Francisco, CA 94105, (415) 538-4112. This request was given a file number of 99-017. This determination may be cited as **"2000 OAL Determination No. 15**."

CONCLUSION

The first challenged rule is a broad restatement of existing law that encompasses many provisions of the Department's regulations concerning the filing of underwriting eligibility guidelines and rules and, therefore, does not constitute a "regulation" subject to the Administrative Procedure Act (Chapter 3.5, commencing with section 11340, Division 3, Title 2, Government Code; hereafter, "APA").

The second challenged rule that requires insurers to reduce all underwriting eligibility guidelines to writing is the only legally tenable interpretation of existing law and, therefore, is not subject to the APA.

ANALYSIS

The Department of Insurance ("Department") is an independent department headed by the Insurance Commissioner ("Commissioner"), an elected official. (Ins. Code secs. 12900 and 12906.) The Commissioner is charged with administering the "provisions of [the Insurance Code] and other laws regulating the business of insurance in [California], and shall enforce the execution of such provisions and laws," including the provisions of chapter 9, titled "Rates and Rating and Other Organizations," commencing with section 1850. (Ins. Code secs. 1860.2, 1860.3, and 12921.)

Although many issues were raised in the request for determination, OAL has the authority to issue a determination only as to the limited question of whether the challenged rules are "regulations" as defined section 11342 of the Government Code, and thus subject to the APA.[2] This determination depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rules are "regulations" within the meaning of Government Code section 11342, subdivision (g), and (3) whether those challenged rules fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174

2 . Government Code section 11340.5, subdivision (b).

Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.)

The Department is an executive branch state agency that has not been expressly exempted by statute. Thus, the APA rulemaking requirements generally apply to the Department. (See *Winzler & Kelly v. Department of Industrial Relations*, 121 Cal.App.3d at 126-128, 174 Cal.Rptr. at 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in the legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

> "(g) 'Regulation' means *every* rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ."

Similarly, agency rules properly adopted as regulations (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Statutes may legally be amended only through the legislative process; duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342, subdivision (g), a rule is a "regulation" for these purposes if (1) the challenged rule is either a rule or standard of general application or a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to either implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer*, *supra*:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.[3])

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

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3. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

There appears to be no dispute regarding whether the two challenged rules are standards of general application. The Department applies these rules to all insurers where applicable; therefore, they are rules of general application.

The next issue is whether the rules implement, interpret, or make specific the law enforced or administered by the Department.

A. First challenged rule: "The Department requires insurers to file all underwriting eligibility guidelines and rules."

Crusader Insurance Company ("Crusader") states in its request for determination the following:

> "Insurance Code sections 1861.01(c) and 1861.05(b) require filing of insurance **rates** prior to their use. [Bold and underlining in original.] California's Code of Regulations, Title 10, section 2643.3(b) explicitly requires such filings to include all *underwriting* forms, rules, and guidelines 'to which changes would have a rate impact.'[4] [Underlining in original.] The law does not explicitly require the filing of forms, rules, or guidelines to which changes would not have a rate impact. . . .
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> ". . . .
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> ". . . [Crusader] believe[s] that eligibility guidelines should not be filed with the [Department]. Existing statutes clearly limit the filing requirements to rates. In support of those statutes, existing regulations help to clarify the fact that filings are limited to rates. However, the [Department] is imposing an interpretation that extends a burden beyond that originally intended by the [L]egislature when enacting statutory law. . . ."[5]

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4. Section 2643.3(b) of Title 10, CCR, provides that ". . . The [rate] application shall be accompanied by the rating manual, rating plan, all policy forms to which changes would have a rate impact, or such other documents as may be necessary to show the distribution of premium within the line. The Commissioner shall require the filing of such other information as he or she deems necessary to review the application." OAL notes that section 2643.3(b) does not specifically mention "underwriting forms, rules and guidelines" as stated by the requester.

5. Request for determination, pp. 1-2. OAL disagrees with the requester that existing law, either statutory or regulatory, limits filing requirements to rates. For filing requirements that go beyond the filing of just "rates," see Insurance Code section 1861.05(b) ("such

In its request for determination, Crusader includes a letter written by the Department, dated June 21, 1999, and refers to it as an illustration of the Department's enforcement of the challenged rule. The request quotes from the letter, in part, as follows:

> "The [Department] continues to attempt inappropriate enforcement, as is reflected in the rate filings that we routinely submit. For example, refer to their letter dated June 21, 1999 . . . . [Par.] In their letter, the [Department] clearly states that '. . . all manual rules, underwriting rules, rates, and forms must be included in a new program filing.' It continues to state that '. . . when underwriting rules are being subsequently revised, they too must also be filed, including both the proposed underwriting rules and the prese[n]t underwriting rules for comparison.' No distinction is made between eligibility guidelines and rates." [Emphasis original.]

In its response, the Department submitted the following concerning the first challenged rule:

> "In support of its allegation that the Department requires the filing of all underwriting guidelines with prior approval rate applications, Crusader cites to a June 21, 1999, letter from Mr. Nicholson of the Department. However, even a cursory reading of that letter demonstrates that Mr. Nicholson is not requiring the filing of all underwriting guidelines. The letter clearly indicates that *manual and underwriting rules must be included in a new program filing. Additionally, when underwriting rules are being revised, they too must be filed*. This requirement is set forth in the Filing Instructions which are incorporated by reference in Title 10, California Code of Regulations, Section 2648.4. Those forms were submitted to the Office of Administrative Law in OAL File No. 93-1103-01C, and approved by that office on December 17, 1993. *The instructions require that, when underwriting rules are being revised, the proposed underwriting rules as well as the present underwriting rules must be attached to the file.* For those programs with different rating tiers, underwriting rules must accompany the filing to show which risks are written in each rate level. The filing instructions also provide that all new program filings should contain corresponding rules,

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other information as the commissioner may require") and Title 10, CCR, sections 2643.3(b) ("require the filing of such other information as he or she deems necessary to review the application") and 2648.4(b) ("submission of relevant underwriting rules").

rates, underwriting guidelines, and forms. Mr. Nicholson's letter simply repeats the requirements of existing regulations, including regulations 2343.3(b)[6] and 2648.4. [Emphasis added.]

"Regulation 2360.2 recognizes that underwriting rules vary by line of insurance or type of coverage. In fact, section 2360.0(b) specifically notes that eligibility guidelines may consist of specific, objective factors as well as categories of specific, objective factors.

"Crusader argues that the guidelines described under section 2360.2 are distinguished from those described under section 2643.3(b) because the determination of eligibility does not always have a rate impact. But whether an applicant is determined to be eligible for one program or another by definition means that one rate will [be] imposed rather than a different rate. Additionally, the determination of eligibility impacts whether a rate is unfairly discriminatory in violation of California Insurance Code Section 1861.05(a)."[7]

Our analysis begins with Insurance Code section 1861.05, which states in part as follows:

"(a) No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter [9, commencing with section 1850 of the Insurance Code]. . . .

"(b) Every insurer which desires to change any *rate shall file a complete rate application* with the commissioner. A complete rate application shall include all data referred to in Sections 1857.7, 1857.9, . . . and 1864 and *such other information as the commissioner may require. . . .*" [Emphasis added.]

Sections 2360.0(b), 2360.2 and 2648.4 of Title 10 of the CCR provide as follows:

2360.0(b): "'Eligibility Guidelines' are specific, objective factors, or

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6. Since title 10 of the CCR does not currently contain a section numbered "2343.3(b)," we assume that this is a typographical error and that the Department actually meant section 2643.3(b) instead.

7. Department's response, pp. 4-5.

categories of specific, objective factors, which are selected and/or defined by an insurer, and which have a substantial relationship to an insured's loss exposure."

Section 2360.2: "An insurer shall maintain eligibility guidelines for every line of insurance for sale to the public. *The Eligibility Guidelines shall be sufficiently detailed to determine the appropriate rating plan[*[8]*] for the insured*. An insured or applicant who meets the eligibility guidelines shall qualify to purchase the insurance." [Emphasis added.]

Section 2648.4, titled "Complete Application":

"(a) In order to be complete, *a rate application must include* the following forms, exhibits, data and documentation, which are incorporated by reference: application for approval (form CA-RA1, 5-1-96 ed.), . . . Rate/Rule/Underwriting Rule Submission Data Sheet (form CA-RA2, 5-1-96 ed.), ... The application must also contain a summary and explanation of the purpose for the filing. *The Filing Instructions (forms CA-IA1--CA-I8, 5-1-96, ed.) for these forms and exhibits are incorporated by reference.*

"(b) Notwithstanding the completeness determination, the Commissioner may later *require the submission of relevant underwriting rules from an applicant in order to perform a complete analysis of an application*." [Emphasis added.]

The Filing Instructions, incorporated by reference in section 2648.4 and last revised 5-1-96,[9] state the following:

"Every insurer wishing to change any rules, rates, forms, or introduce a new program must complete a Rate Application or Forms Application and file it

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8. Section 2360.0(d) defines "Rating Plan" as "any rating plan, rating system, or method, used by an insurer to develop a final rate or Premium." Section 2360.0(c) defines "Premium" as "the final amount charged to an insured for insurance after applying all applicable rates, factors, modifiers, credits, debits, discounts, surcharges, fees charged by the insurer and all other items which change the amount the insurer charges to the insured."

9. OAL file no. 96-0404-02N, filed with the Secretary of State on 5-15-96, Register 96, No. 20.

to the Commissioner. . . .

". . . .

"Application

"A RATE APPLICATION must be submitted for all rate and rule changes. . . . [Capital letters in original.]

"A rate impact includes, but is not limited to, a change in the rates (increase or decrease) or coverage changes (broadening or restricting).

". . . .

"Underwriting Rules

"When underwriting rules *with rate impact* [emphasis added] are being revised, the proposed underwriting rules as well as the present underwriting rules must be attached to the file. For those programs with different rating tiers, underwriting rules must accompany the filing to show which risks are written in each rate level.

". . . .

"New Programs

"A new program is a new concept without an existing rate manual, policy forms and underwriting rules. . . .

". . . . *ALL manual rules, underwriting rules, rates, and forms must be included in a new program filing*." [Underlining and capital letters in original; emphasis added in italics.][10]

The Department's letter, dated June 21, 1999, to Crusader states in part the following:

"The [Department's] Rate Application Filing Instructions require that all manual rules, underwriting rules, rates, and forms must be included in a new

10 . Filing Instructions, 05-01-96 ed., pp. CA-IA2 and CA-IA3, as incorporated by reference in title 10, CCR, section 2648.4.

program filing. . . ."

Crusader asserts that this part of the letter illustrates the first rule being challenged. In its response, the Department states that this letter "demonstrates that Mr. Nicholson is *not* requiring the filing of all underwriting guidelines. The letter clearly indicates that manual and underwriting rules must be included in a *new program filing*."[11] (Emphasis added.).

We agree with the Department that all underwriting eligibility guidelines and rules must be included *in a new program filing* as required by the Filing Instructions that are incorporated by reference in section 2648.4, which has already been adopted as a regulation pursuant to the APA. Therefore, this part of the challenged rule is a restatement of existing law not subject to the rulemaking requirements of the APA.

The following is a continuation of the Department's June 1999 letter:

> "The instructions further indicate that when *underwriting rules are being subsequently revised*, they too must also be filed, including both the proposed underwriting rules and the present underwriting rules for comparison. . . ." [Emphasis added.]

In its response, the Department reiterates this same rule as follows:

> ". . . Additionally, when underwriting rules are being revised, they too must

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11 . Department's response, p. 4. Additionally, in its response, the Department states that "eligibility requirements and underwriting guidelines are typically used interchangeably in the insurance industry. Eligibility requirements or underwriting guidelines set forth the requirements an applicant must meet to qualify for a particular rate level. Specific and clearly articulated rating, eligibility, or underwriting rules eliminate the possibility that similar risks will be rated differently." (Page 2, fn. 2.) OAL acknowledges Crusader's argument (letter dated April 11, 2000) that "eligibility requirements" and "underwriting guidelines" have different meanings; however, Crusader relies on the definitions of "eligibility" and "underwriting" contained in "*Webster's Dictionary* (Tenth edition, copyright 1993)." Crusader's argument does not make any reference to section 2360.0(b), Title 10, CCR, which provides a definition of "eligibility guidelines" as adopted by the Department. OAL also notes that Crusader uses the term "underwriting eligibility guidelines and rules" in setting forth the challenged rules in its request for determination. (Request for Determination, p.1.) Crusader also quotes from the letter the language, "all manual rules, *underwriting rules*, rates, and forms must be included in a new program filing," (emphasis added) as illustrating the challenged rule. Based on OAL's reading of relevant statutes, regulations, and documents submitted by both Crusader and the Department, it appears that the terms are interchangeable and thus have the same meaning.

be filed. This requirement is set forth in the Filing Instructions which are incorporated by reference in Title 10 [CRR], Section 2648.4. Those forms were submitted to the [OAL] in OAL File No. 93-1103-01C, and approved by that office on December 17, 1993. The instructions require that, when underwriting rules are being revised, the proposed underwriting rules as well as the present underwriting rules must be attached to the file. . . ."

The Filing Instructions (5-1-96 edition)[12] currently provide the following:

> "When underwriting rules *with rate impact* are being revised, the proposed underwriting rules as well as the present underwriting rules must be attached to the file. . . ." [Emphasis added.]

In a letter dated September 28, 2000, OAL requested the Department to supplement its response with a written discussion specifically addressing the "issue concerning the distinction between requiring the submission of all revised underwriting rules and requiring just revised underwriting rules 'with rate impact.'" The Department, in a supplement to its response, provided the following:

> "The Department has *not* taken the position that 'all' revised underwriting rules must be filed. Existing regulations require that underwriting rules must be filed with a rate application in three circumstances: first, when a new program is filed; second, when a revision to the underwriting rule has a rate impact; and, third, when . . . the submission of underwriting rules is necessary in order to perform a complete analysis of an application. [Footnote omitted; emphasis added.]"[13]

We agree with the Department that existing regulations require the filing of underwriting rules in the three circumstances described by the Department. Although the June 1999 letter and the Department's initial response do not fully and clearly articulate each of the three circumstances in which underwriting rules are required to be filed, it does not appear to OAL that the Department was implementing a new rule of general application in its June 1999 letter that modifies its regulations. It is clear that the Department is fully aware of the three

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12. In 1996, the Filing Instructions were revised. (OAL file no. 96-0404-02N, filed with Secretary of State on 5/15/96, Register 96, No. 20.)

13. Department's supplemental response, dated October 5, 2000, p. 2.

circumstances that govern when underwriting rules are required to be filed, including revised underwriting rules with rate impact. We also note that the Department, in both its initial response and supplemental response, states that it has *not* taken the position that *all* underwriting rules or that *all* revised underwriting rules must be filed. OAL finds, therefore, that the first challenged rule does not constitute a "regulation" as defined by Government Code section 11342(g).

B. Second challenged rule: "The Department requires insurers to reduce all underwriting eligibility guidelines to writing."

In regard to the second challenged rule that requires insurers to reduce all underwriting eligibility guidelines to writing, we find that this rule is the only legally tenable interpretation of existing law.

Insurance Code section 1857 requires in part as follows:

> "(a) Every insurer . . . shall maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of its experience or the experience of its members and of data, statistics, or information collected or used by it in connection with the rates, rating plans, rating systems, underwriting rules, policy or bond forms, surveys, or inspections made or used by it so that those records will be available at all reasonable times to enable the commissioner to determine whether that . . . insurer, every rate, rating plan, and rating system made or used by it, complies with the provisions of this chapter [9] applicable to it. . . ."

Sections 1857.2 and 1857.3 of the Insurance Code also subject the insurer, and officers, managers, agents and employees of insurers, to examination by the commissioner, at any reasonable time, "to ascertain whether [the] insurer and every rate and rating system used by it . . . complies with the requirements and standards of [chapter 9, commencing with section 1850, of the Insurance Code] . . . ." The commissioner may require that "all books, records, accounts, documents or agreements governing [the insurer's] method of operation, together with all data, statistics and information of every kind and character collected or considered by such . . . insurer in the conduct of the operations to which [the] examination relates," be exhibited to determine compliance with the requirements and standards of chapter 9.

Title 10, CCR, section 2360.2 requires insurers to "maintain eligibility guidelines

for every line of insurance offered for sale to the public. The Eligibility Guidelines *shall be sufficiently detailed to determine the appropriate rating plan for the insured*. . . ." (Emphasis added.)

Section 2648.4, which incorporates by reference the Filing Instructions (5/1/96 ed.), requires underwriting eligibility guidelines (e.g., underwriting rules) to be attached to all filings for new programs and to file all revised underwriting eligibility guidelines that have a rate impact.

Unless documents are reduced to writing, it makes it virtually impossible to "attach" documents to forms that are required to be filed, to "maintain" documents in sufficient detail "to determine the appropriate rating plan for the insured," or to be subject to examination to ensure compliance with the Insurance Code. As the Department points out in its response, "Crusader does not offer a plausible alternative construction."[14]

We, therefore, agree with the Department. The second challenged rule, which requires underwriting eligibility guidelines to be reduced to writing, is the only legally tenable interpretation of governing law and, therefore, does not constitute a "regulation" subject to the APA.

CONCLUSION

For the reasons set forth above, OAL finds that:

The first challenged rule is a broad restatement of existing law that encompasses many provisions of the Department's regulations concerning the filing of underwriting eligibility guidelines and rules and, therefore, does not constitute a "regulation" subject to the APA.

The second challenged rule that requires insurers to reduce all underwriting eligibility guidelines to writing is the only legally tenable interpretation of existing law and, therefore, is not subject to the APA.

14 . Department's response, p. 5.

DATE: October 24, 2000

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